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Supreme Court, U.S.
FILED
APR 18 2003
OFFICE OF THE CLERK

No. 02-1171

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 18, 2003

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I. THE TENTH CIRCUIT'S STATE ACTION DECISION SHOULD BE VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF AN INTERVENING DECISION OF THE OKLAHOMA SUPREME COURT

The court of appeals assumed without deciding that the state action doctrine applied to antitrust claims arising under Oklahoma law. (24a). The court then held that SWBT's pre-competition contracts were not protected by the doctrine because there was no clearly articulated state policy which "expressly permitted" them. (25a). This unduly restrictive standard is inconsistent both with the law of other circuits and this Court's precedents. While "expressly permitted" conduct is sufficient to invoke the state action doctrine, it is not necessary. So long as the anticompetitive effects of private actions supervised by state agencies operating within their statutory discretion are foreseeable, an antitrust defendant cannot be liable for those foreseeable results. (Pet. 12-17).

Although the decision below creates a conflict with other circuits which do not impose an "expressly-permitted" requirement, plaintiffs argue that an intervening decision of the Oklahoma Supreme Court, *Fine Airport Parking, Inc. v. City of Tulsa*, 2003 OK 27, __ P.3d __ (Okla. 2003) (Resp. App. 1a), renders the immunity issue moot. To the contrary, the intervening decision warrants vacatur and remand.

Fine involved a claim by a private parking facility owner that the City of Tulsa had excluded competition for airport parking by charging unreasonably low prices. Tulsa asserted that the state action doctrine immunized it from antitrust liability because state law authorized its allegedly anticompetitive conduct. The Oklahoma trial court and the Oklahoma Court of Civil Appeals both found that the state action doctrine was incorporated into Oklahoma law

(Resp. App. 3a), and that Tulsa thus was immune from antitrust liability.[1] The Oklahoma Supreme Court, however, while upholding the finding of immunity, rejected state action as a basis. For the first time, it held that because principles of federalism were not implicated when a city was a defendant in a *state* antitrust case, the *federal* state action doctrine should not apply. (Resp. App. 9a).[2]

Notwithstanding this aspect of its holding, the Oklahoma court's analysis in *Fine* went on to establish an immunity under Oklahoma law based on legislative intent that is significantly broader than the federal state action doctrine. Application of that analysis to the proceedings of the Oklahoma Corporation Commission ("OCC") that considered SWBT's pre-competition contracts at issue here shows that they are protected from antitrust attack. Although the statute in *Fine* authorized municipalities only to "establish the terms and conditions and fix the charges, rentals, or fees" for airport parking, the Oklahoma Supreme Court read into this language the possibility of "anti-competitive effects" flowing from the implementation of these commercial activities. (Resp. App. 13a-14a). It thus "follow[ed] logically" (Resp. App. 14a) that even the predatory pricing alleged in *Fine* was immune from antitrust attack.

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[1] These rulings were in harmony with the state legislature's instruction that Oklahoma antitrust law be construed consistent with federal antitrust law. *See* OKLA. STAT. tit. 79, § 212 (103a).

[2] In a prior opinion involving state action immunity as a defense to alleged violations of Oklahoma antitrust law, the Oklahoma Supreme Court rejected the defense on the merits, but did not question its applicability under state law. *See Bd. of Regents of the Univ. of Okla. v. NCAA*, 561 P.2d 499, 504-505 (Okla. 1977). It thus appeared that the state action doctrine applied under Oklahoma law.

It is particularly significant that the Oklahoma Supreme Court found that mere state authorization for a municipality to engage in commercial activity and set prices for its services was a sufficient basis to establish immunity for allegedly anticompetitive pricing. (Resp. App. 17a-19a). This holding stands in sharp contrast to the exacting requirements imposed in this case by the court of appeals, which denied immunity absent a clearly articulated state policy that "expressly permitted" the alleged restraints. It also contrasts with the approach taken in cases interpreting the "state action" doctrine generally, which refuse to infer the power to regulate anticompetitively from general authority to engage in ordinary business practices. *See, e.g., Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist.*, 171 F.3d 231, 235 (5th Cir.), *cert. denied*, 528 U.S. 964 (1999) (statutory grant of power to make contracts did not authorize entry into anticompetitive joint venture).

Under *Fine's* analysis a finding of immunity is warranted here. The OCC had plenary authority over public utilities like SWBT, including the authority to regulate SWBT's contracts. (*See* Pet. 13-16). It also had the authority to determine the timing and manner of the transition to competition in the provision of payphone service. (2a). After formal rulemaking proceedings to establish the regulations for that transition, the OCC declined the urgent requests of the state attorney general and competitors to abrogate SWBT's contracts. Instead of bringing their contract complaints back to the OCC, as the agency had specifically authorized, plaintiffs made them the centerpiece of their antitrust claims. As the dissent below recognized, these claims were "a collateral attack on the OCC's right to supervise, regulate and control matters relating to performance of [public utility] duties and of correcting abuses." (47a). The *Fine* decision shows that commercial contracts like SWBT's, no less than airport charges, are immune from antitrust liability where they are

subject to the authority and supervision of a state agency. Thus, even if this Court decides not to grant plenary review on the state action doctrine, it should vacate the Tenth's Circuit's decision and remand to take account of the Oklahoma Supreme Court's analysis in *Fine*.[3]

Vacating and remanding would allow the court of appeals properly to consider SWBT's immunity from state antitrust liability in light of *Fine* (using certification pursuant to Tenth Circuit Rule 27.1(A) and OKLA. STAT. tit. 20, § 1601 *et seq.* if appropriate). "'Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.'" *Lords Landing Village Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)); *see also Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (vacating and remanding for the court of appeals to consider certifying an unsettled, controlling issue of state law to the state's highest court).

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[3] Plaintiffs advance three arguments that, they claim, would deny SWBT state antitrust immunity, notwithstanding *Fine*. (*See* Opp. 10-11). All are wrong. First, the state action question presented in the Petition has been superseded by a post-Petition decision of Oklahoma's court of last resort, so a remand to consider new controlling law is appropriate. Second, the Tenth Circuit's inability to consider the broad immunity subsequently recognized in *Fine* does not preclude remand, but rather counsels in favor of it. Third, plaintiffs mischaracterize briefs below to suggest SWBT disavowed an immunity argument in the district court. In reality, SWBT moved for a directed verdict regarding its pre-competition contracts, arguing on more general immunity principles, not state action, that liability under Oklahoma antitrust law could not be imposed given the OCC's review of those contracts. (TEL-SApp. 0137, 0154-55).

Because the *Fine* decision represents a change in Oklahoma law that occurred after the Petition was filed, the questions presented did not raise this issue. However, if, notwithstanding these circumstances, this Court believes that a formal amendment is needed to appropriately address the intervening decision in *Fine*, then SWBT respectfully requests leave to add the following question presented: "Whether the court of appeals erred in predicating its analysis of SWBT's immunity defense on federal law rather than on Oklahoma law." *See* Robert L. Stern *et al.*, SUPREME COURT PRACTICE § 6.27 (8th ed. 2002).

II. THE DECISION BELOW CONFLICTS WITH LAW IN OTHER CIRCUITS AND CONTROLLING STATE LAW BY AWARDING DAMAGES FOR AVOIDABLE FUTURE MISCONDUCT

Notwithstanding plaintiffs' speculation about possible bases for the jury's award (Opp. 16-18), the court of appeals found that it rested on the presumed future enforcement of SWBT's contracts. (32a). The law in other circuits and in Oklahoma, however, bars the imposition of damages for avoidable future conduct, including the future enforcement of existing contracts. (Pet. 21-22).[4]

Oklahoma has long precluded awarding damages for avoidable future misconduct. *See Comar Oil Co. v. Hackney*, 250 P. 93, 99 (Okla. 1926) ("if the injury . . . was abatable, then the plaintiff would only be entitled to damages that

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[4] Plaintiffs' characterization of this damages question as "fact-bound" is nonsense. (Opp. 14-15). The only "fact" underlying the Tenth Circuit's rejection of SWBT's position was its view that SWBT had not proven it would terminate the offending contracts after trial. (33a-34a). The reasoning and assumptions of the court of appeals on that score were deeply flawed. (Pet. 22-23). If they are facts at all, those determinations were clearly erroneous.

had accrued at the time the suit was brought"); *see also Fleming v. Perkins*, 212 P.2d 122, 129 (Okla. 1949) ("where the cause of injury is abatable . . . future damages may not be awarded"). The Tenth Circuit was obliged to consider Oklahoma law, *Thomas v. American Home Products, Inc.* 519 U.S. 913, 915 (1996) (Scalia, J., concurring) (states are the "final expositor" of state law); *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512 (10th Cir. 1994), but it failed to do so in its discussion of damages, even when raised by SWBT. This failure to follow state law is an additional basis to vacate the decision below and remand for further consideration, as discussed in Point I above.

Plaintiffs argue that these damages were proper because the jury was instructed to award damages only for "past" conduct. But that instruction is beside the point, since it failed to tell the jury that damages could not be awarded based on the presumption that SWBT would continue to enforce its contracts in the future. (SWBT-App. 3509). Indeed, the instruction reflected the district court's erroneous view that damages could be awarded for future enforcement of SWBT's contracts. (70a). And if any part of the general verdict included such damages, the entire verdict must fall. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 30 (1962); *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884); *see also Burke v. Thomas*, 313 P.2d 1082, 1089-90 (Okla. 1957) (remittitur or new trial).[5]

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[5] Plaintiffs' waiver arguments are sophistry. SWBT moved to strike plaintiffs' future damages theory during trial, and objected to plaintiffs' proposed jury instruction. (SWBT-App. 8329, 8353-55). SWBT filed a motion for a new trial raising the issue of future damages. (70a). Plaintiffs withdrew their request for injunctive relief only *after* SWBT filed a motion challenging plaintiffs' future damages claim. There is no rule of law that required SWBT to object again when its opponents dropped the remainder of their remedy claim.

By failing to consider state law on the issue of future damages, the lower court compounded its substantive errors. (*See* Pet. 20-23). Given this fatal omission, it is appropriate to vacate and remand this issue for reconsideration together with *Fine's* immunity analysis.

III. THE DECISION BELOW CONFLICTS WITH LAW IN OTHER CIRCUITS AND THIS COURT'S PRECEDENTS BY HOLDING AS A MATTER OF LAW ON SUMMARY JUDGMENT THAT THE RELEVANT MARKET NEED NOT ACCOUNT FOR INTERCHANGEABLE PRODUCTS WHICH PREVENT HARM TO CONSUMERS

Contrary to plaintiffs' assertions, SWBT has not "recast the market structure in a manner that is contrary to the undisputed summary judgment facts." (Opp. 23, 25). Putting aside differences over terminology – *e.g.*, whether locations owners are "distributors" or "customers" of payphone providers (Opp. 2, 3, 23 n.12), or provide "inputs" as plaintiffs told the court of appeals – the fundamental economic relationships between payphone providers, location owners and consumer end-users are not in dispute: payphone providers lease space from location owners in which to place their phones (often paying location owners "rent" based on commissions from call revenue) (3a), so that the providers can earn money when consumers place calls from those phones.

In applying the antitrust laws, the proper focus is on the "economic reality of the relevant transactions," not on arbitrary labels used to describe markets and market actors. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 208 (1968); *see also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 732 (1988); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986). Looking at the "economic reality" of the payphone business, the "area of effective competition" is where the parties

compete for "consumer potential" – namely, in the sale of payphone services to end-users. *Cf. Intergraph Corp. v. Intel Corp.* 195 F.3d 1346, 1353 (Fed. Cir. 1999).[6]

Because the antitrust laws are first and foremost intended to protect consumer welfare, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), the purpose of a market definition inquiry "is to determine whether an arrangement has the potential for genuine adverse effects on competition." *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 460 (1986). Here, plaintiffs cannot avoid the burden of proving harm to competition in the consumer market where they allegedly lost sales, because proof of such harm is an essential element of an antitrust damages claim. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The decision below holding otherwise conflicts with other circuits (Pet. 24-26), and this Court's antitrust decisions.

Plaintiffs beg the question of addressing "economic reality" by claiming that SWBT advocates an approach that would "require proof of injury to competition in a downstream ultimate consumer market if the *relevant* market is defined upstream." (Opp. 26) (emphasis in original). The question remains what market is "*relevant*." "Economic reality" demands that in a lawsuit between competitors in which damages are measured by lost revenue from end-users, the relevant market cannot be

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[6] Plaintiffs' argument that there are "sales" at the location owner level (Opp. 23 n.12) defies "economic reality." The core of plaintiffs' businesses, and their damages claims, are the revenues received for calls made by consumers on their payphones. The "economic reality" is that the commissions paid to location owners to rent space for payphones are costs, not "sales," and in any event, do not obviate the need for plaintiffs to show injury to competition at the level where plaintiffs and SWBT compete to make a living – at the level of the consumer end-user.

defined (as it was here) to bar a jury from assessing the impact (or lack thereof) of all reasonably interchangeable products (cellphones and payphones) on those end-users.[7]

Plaintiffs' continued reliance on monopsony cases (Opp. 22-23) is equally misguided. This is not a case brought by location owners claiming that SWBT's alleged monopsony was used to depress commissions.[8] Accordingly, "economic reality" demands more than blind application of cases involving such claims. It compels a nuanced evaluation of market realities that encompasses all evidence relevant to consumer harm.

Plaintiffs' Opposition also fails to justify the Tenth Circuit's flouting of basic principles governing summary judgment. While acknowledging there was insufficient

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[7] The suggestion that SWBT acquiesced in defining the relevant market by reference to location owners (Opp. 24 n.13, 26 n.15) is false. SWBT opposed plaintiffs' motion to define the market in that manner, sought interlocutory review of the court's ruling on market definition (which was denied, SWBT-App. 0018), and raised the issue on appeal. SWBT had no obligation to further object to a jury instruction defining the market in accordance with a summary judgment ruling it had already opposed. Nor did the court of appeals find waiver; it merely observed that the district court defined the market such that the jury could well have based its verdict on an assessment of the consumer/end-user market. (5a). If that was so, however, SWBT was entitled to make a comprehensive presentation of evidence about cellphones since, as the court of appeals explicitly found, there was no basis to exclude cellphone substitution from the market *if defined from the perspective of end-users*. (9a). Indeed, plaintiffs now argue their own evidence of adverse consumer impact (Opp. 26 n.16), but ignore the exclusion, *inter alia*, of SWBT's principal expert testimony about cellphones based on the erroneous market definition ruling. (66a).

[8] While the record shows, contrary to plaintiffs' claim (Opp. 2-3), that location owner commissions increased, the "economic reality" is that plaintiffs, as competitors, actually benefit from lower commissions (which reduce their costs), and hence could claim no damages in the location market. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

evidence to support the grant of summary judgment (8a-11a), the court of appeals affirmed because "there is no doubt that pay phones and cellphones are not interchangeable at the location owner level, and that is the level where the *Plaintiffs argued* that Southwestern Bell had monopolized competition." (11a) (emphasis added). Once again, plaintiffs fail to explain how "economic reality" permits market definition to be determined on the basis of plaintiffs' pleading rather than evidence and jury deliberation. The decision below usurps the jury's factfinding role, and is fatally inconsistent with *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992).

While this issue warrants plenary review (*see* Pet. 24-29), if the Court vacates and remands the first two questions presented by the Petition, the Court should also remand for reconsideration of the market definition issues in light of *Kodak* and *Brunswick*.

CONCLUSION

For the foregoing reasons, and those set forth in SWBT's Petition, the Petition for a Writ of Certiorari should be granted.

April 18, 2003

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